

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



DATE ISSUED: September 1, 2000

CASE NO.: 2000-ERA-6

IN THE MATTER OF

SYED M.A. HASAN
Complainant

v.

BURNS & ROE ENTERPRISES, INC.
Respondent

**RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT AND DISMISSING COMPLAINT**

A. Background

This proceeding comes under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. Section 5851 et. seq., and related protective regulations at 20 C.F.R. Part 24. On November 22, 1999, Complainant, Syed M.A. Hasan (Hasan), initiated these proceedings by filing a complaint against Respondent, Burns & Roe Enterprises, Inc., (B&R), claiming in general terms that B & R had discriminated against him in violation of the ERA by refusing to hire him despite repeated applications and available work for which he was qualified allegedly because of his activity in reporting unspecified safety concerns to the Nuclear Regulatory Commission (NRC). On December 7, 1999, the Regional Administrator advised the parties that there was no merit to the complaint to which Hasan appealed on December 13, 1999 requesting a hearing before an Administrative Law Judge.

On December 17, 1999, I issued a Notice of Hearing and Pre-Hearing Order directing *inter alia*, that Hasan filed a formal complaint detailing the nature of each and every violation, as well as the relief sought followed by Respondent's answer admitting or denying the complaint allegations, and setting forth appropriate defences. The parties were also advised to complete a pre-hearing exchange of witness names and summary of their testimony together with documents to be introduced at trial and pre-trial motions.

Pursuant to my Order, Hasan on December 27, 1999, filed a formal complaint claiming: (1) he had worked in the past for B & R as a civil/structural engineer from April, 1974 to September, 1979; (2) in 1979, while employed by B & R he reported safety concerns to the NRC (external protected activity), pertaining to critical pipe support issues at the Clinch River Breeder Nuclear Project and reported faulty deflection/stiffness calculations to his supervisors Patel and Palm (internal protect activity); (3) since March 27, 1999, and for years prior thereto, B & R has discriminated him because of his protected activity by apparently refusing to hire him for available work as a civil/structural /pipe support engineer, despite having applied for such work on many occasions to B & R by telephone

calls and resumes dated May 28, July 9, September 1, November 6, 1999; (4) while working for B & R he received regular and annual merit raises; and (5) in September 1979 B & R forced him to resign apparently because he refused to sign faulty deflection/stiffness calculations.

On January 11, 2000, B & R filed its answer denying any record or recollection of Hasan's whistleblowing activities in the 1970's, as well as Hasan's other allegations while maintaining that it had legitimate, non-discriminatory and non-retaliatory reasons for not hiring Hasan. Further, B & R asserted that Hasan had a history of filing meritless whistleblower claims of which the instant claim is yet another example. B & R requested dismissal of the complaint and imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure (FRCP), requiring Hasan to pay attorney fees and costs incurred by B & R in defending a meritless complaint.

On January 18, 2000, Hasan filed a motion to disqualify Respondent Attorney Mark N. Mallery and his law firm and for default judgment and sanctions based upon a letter from Mallery to himself advising that Mallery intended to seek, pursuant to Rule 11 of the Federal Rules of Civil Procedure, attorney's fees and costs incurred by B & R in defending Hasan's meritless complaint against B & R unless Hasan withdrew said complaint. Hasan contended Mallery's conduct constituted a threat directly related to his protected activity in filing a complaint against B & R and that such conduct constituted a violation of the ERA, 29 C.F.R. §24.2 warranting a default judgment and sanctions including disqualification of Mallery and his law firm from further participation in this matter, and issuance of an order requiring B & R to hire him at a rate of \$55.00 per hour while reimbursing him \$1,000,000 in compensatory damages. On March 18, and July 7, 2000, Hasan renewed his motion for default judgment and sanctions arguing that B & R had lied about his past work records when they stated Hasan was not entitled to be rehired because of inefficient performance and excessive absenteeism, when in fact, he had received merit raises and had been promoted to senior engineer and had not abused any absentee policy of B & R.

On March 18, 2000, Hasan also filed an amended complaint asserting that B & R had discriminatorily refused to hire him since May 18, 1999 because of his 1979 protected activity as described above, and claimed that B & R had not produced records pursuant to his December 13, 1999 request for production of documents and interrogatories. On April 4, 2000, B & R filed an amended answer again denying any knowledge of Hasan's alleged whistleblowing activity or lying about Hasan's former work record or manufacturing reasons for not hiring him while asserting that it had legitimate reasons for not hiring him in 1999.

Prior to filing motions for summary judgments, the parties engaged in discovery with Hasan initiating an extensive, and in many cases an overboard request for documents and answers on December 13, 1999. On March 8, 2000, B & R filed a reply to Hasan's discovery request which included production of twenty (20) separate items and answers to 12 interrogatories and numerous subparts. In a recorded conference call with the parties on March 21, 2000, Hasan complained about limited production of employment records by B & R¹. Counsel for B & R explained that after an exhaustive search they had turned over all records in their possession pertaining to Hasan which in some cases were limited due to the destruction of personal records after a 10 year period with Hasan's last employment more than 20 years ago. After having listened to extensive arguments, I found that Employer had reasonably complied with Hasan's request, but directed B & R to provide the names of structural engineering supervisors at B & R Oradell, New Jersey, corporate office. I also instructed Hasan that he had the right to depose B & R supervisors, so as to establish either knowledge or discriminatory treatment.² B & R subsequently provided Hasan with

¹ A copy of transcript of the March 21, 2000 call is attached as ALJX-1.

² A copy of B & R's discovery response is attached as ALJX-2.

a list of structural supervisors and filed a much more limited and appropriate production request to which Hasan responded.³

During a recorded conference call of May 31, 2000,⁴ I instructed B & R to turn over a November 30, 1999, letter it sent to OSHA stating that there were two non-discriminatory reasons for not hiring Hasan, inefficient performance/abuse of absences and lack of essential qualifications (PE or professional engineer license) for all but entry level positions in the civil/structural field.⁵ B & R complied with this instruction. Thereafter, the parties filed their motions for summary judgment and responses thereto.⁶

B. Substantive Law and Procedure

The standard for granting summary judgment or decision is set forth at 20 C.F.R § 18.40(d) (1994) which is derived from Federal Rules of Civil Procedure (FRCP) 56. Section 18.40(d) permits an Administrative Law Judge to enter summary judgment for either party “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision.” The Administrative Law Judge may also deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

Section 18.40(c) provides that when a motion for summary judgment is made and supported by appropriate evidence, the non-movant or party opposing the motion may not rest upon mere allegations or denials of such pleading, but must set forth specific factors showing there is a genuine issues of material facts. As the Supreme Court stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) the non-movant must present affirmative evidence in order to defeat a properly supported motion for summary judgment, even where the evidence is within the possession of the moving party, as long as the non-movant had a full opportunity to conduct discovery.

The non-movant’s evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. Where the non-movant presents admissible direct evidence such as affidavits, answers to interrogatories or depositions, the judge must accept the truth of the evidence set forth without making credibility or plausibility determinations. T.W. Electric Service v. Pacific Electric Contractor, 809 F.2d 626, 631 (9th Cir. 1987). Conversely, if the non-movant fails to make a showing sufficient to establish the existence of an element essential to his case and on which they bear the burden of proof at trial, there is no genuine issue of material fact and the movant is entitled to summary judgment. Celotex Corp., v. Catrett, 477 U.S. 317, 322-323

³ A copy of B & R’s supplemental response is attached as ALJX-3.

⁴ A copy of the transcript of May 31, 2000 call is attached as ALJX-4.

⁵ A copy of the November 30, 1999 letter is attached as ALJX-5.

⁶ On August 28, 2000, Counsel for B & R filed a motion for leave to file a reply to Complainant’s opposition to its motion for summary judgment contending that its response was necessary to address issues raised in Complainant’s opposition. All issues raised by Complainant’s opposition have already been dealt with in this decision, and thus, I find no need to consider B & R’s reply. Accordingly, said motion is denied as well as Hasan’s request to reply to said motion.

(1986).

Further on summary judgment, the Court is required to review all evidence of record drawing all reasonable inferences from the underlying facts in the light most favorable to the non-movant Reves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 2110 (2000); Matsushita Elec. Indus. Co. Ltd., v. Zenith Radio Corp., 475 U.S. 574 587 (1986). However, the non-movant must do more than show that there is some metaphysical doubt as to material facts or rely upon mere allegations or denials setting forth specific facts showing there is a genuine issue for trial. J. Marshall Trieber, 87-ERA- 25 (Sec’y Sept 9, 1993).

In the present case, Hasan, as the complainant bears the initial burden of establishing a prima facie of discrimination. This means Hasan must prove the following 4 elements: (1) he engaged in protected activity; (2) B & R knew of the protected activity; (3) B & R subjected him to adverse employment action; and (4) a nexus or connection exists between the protected activity and the discharge, i.e., B & R decided not to hire him in part because of his protected activity. Bechtel Construction Co., v. Secretary of Labor, 50 F.3d 926, 933-934(11th Cir.1995); Simon v. Simmons Foods, Inc., 49 F. 3d. 386, 389 (8th Cir. 1995); Deford v. Secretary of Labor, 700 F.2d 281 (6th Cir. 1983). Regarding the fourth element, the evidence must be sufficient to permit an inference that the protected activity was the likely reason for the adverse action. Macktal v. U.S. Dept. of Labor, 171 F. 3d 323 (5th Cir. 1999).

Hasan has the obligation to establish by a preponderance of evidence all four elements. If he fails to meet this burden, neither the burden of proof nor the burden of production shifts to B & R, and the case must be dismissed.

C. Parties Contention

In its motion for summary judgment, B & R contends that the undisputed evidence shows that Hasan failed to show that he engaged in protected activity, or that B & R was aware of such activity, or that a causal connection existed between the alleged protected activity and B & R’s decision not to hire him. Regarding Hasan’s alleged protected activity, B & R notes that the only asserted “protected activity” related solely to 1979 internal complaints, wherein, Hasan asserts he refused to accept faulty deflection stiffness calculations on steel members used to support pipes at the Clinch River Breeder Reactor, and that when he advised supervisor Patel of the error which was based on incorrect mechanical procedures Patel told him to nevertheless follow such incorrect procedures. Rather than follow such instructions, Hasan decided to quit working for B & R and about 2 to 4 weeks later accepted a higher paying position with Nuclear Power Services. (Hasan Deposition, pp. 89-107). Hasan admittedly was never disciplined or threatened with discipline for his refusal, nor did he ever report the concern to any governmental agency until the instant complaint 20 years later (Hasan Deposition, p. 111, 115). Assuming such activity took place, B & R argues that since it was merely internal to B &R and did not involve any competent governmental entity, it was not protected activity under the ERA. Brown & Root, Inc., v. Donovan, 747 F.2d 1029, 1036 (5th Cir. 1984). Further, such internal activity did not become protected until the 1992 amendments to the ERA. Macktal.

Regarding the issue of knowledge, B & R argues that Hasan is required to present admissible evidence beyond mere inference, assertion or speculation showing B & R was aware of his protected activity before it decided not to hire him and that Hasan presented no evidence, direct or circumstantial, establishing prior B & R knowledge of any protected activity by Hasan. B & R points out that Hasan

admittedly did not know any current supervisor of B & R including Morton Rothstein who refused to hire him on November 2, 1992, and had no contact with any B & R supervisor after leaving B & R in 1979 other than Palm in 1985, when he inquired, but was discouraged, about reemployment with B & R. (Hasan Deposition, pp. 112, 113, 124-145, 161-163).

B & R asserts that it was unaware of Hasan's other whistle blowing activities against other employers and that Rothstein never saw Hasan's letter of November 6, 1999 addressed to B & R in which he asserted prior contact with the NRC about other unidentified safety related design problems. Rather, Rothstein reviewed only a faxed letter of November 2, 1999, in which Hasan applied for a position of senior civil/structural engineer citing his past 23 years experience in the nuclear industry. Further, Rothstein, the sole hiring official, had no knowledge of Hasan's whistle blowing or safety complaints against B & R or any other company and no knowledge of an OALJ website listing ERA complaints filed by Hasan. B & R argues that Hasan's subjective beliefs of employer knowledge and retaliation cannot serve as a basis for judicial relief. Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997); Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 42 (5th Cir. 1996).

B & R does not dispute Hasan's extensive whistleblowing and complaint filing activity against multiple other employers. Indeed, DOL has been beset by a multitude of such filings including: Hasan v. Commonwealth Edison Company and Estes Group, Inc., Case No. 2000-ERA-1 (ALJ Dec. January 10, 2000); Hasan v. Commonwealth Edison Company and Estes Group, Inc., Case No. 1999-ERA-17 (Sec'y Dec. and Order, September 16, 1999); Hasan v. System Energy Resources, Inc., Case No. 89-ERA-36 (Sec'y Dec. and Order, September 23, 1992); Hasan v. Nuclear Power Services, Inc., Case No. 36-ERA-24 (Sec'y Dec. and Order, June 26, 1991); Hasan v. Nuclear Power Services, Inc., 86-ERA-36 (ALJ Dec. July 27, 1989); Hasan v. Bechtel Power Corporation, Case No. 93-ERA-40 (Sec'y Dec. and Order February 13, 1995); Hasan v. Bechtel Power Corporation, Case No. 93-ERA-22 (ALJ Dec. December 8, 1994); Hasan v. Bechtel Power Corporation, Case No. 94-ERA-21 (Sec'y Final Order Approving Settlement, Mar. 16, 1995); Hasan v. Bechtel Corporation, Case No. 93-ERA-40 (ALJ Dec. Approving Settlement, December 9, 1994); Hasan v. Intergraph Corp., Case No. 96-ERA-17 (ARB Dec. and Order, August 6, 1977); Hasan v. Sargent & Lundy, Case No. 96-ERA-27 (ALJ Dec. November 4, 1996).

Regarding the issue of nexus or causal connection between protected activity and adverse employment action, B & R argues that Hasan failed to show any evidence establishing a causal connection between his action in 1979 or thereafter, and B & R's decision in 1999 not to hire him and that the remoteness in time between Hasan's actions in 1979 and B & R's refusal to hire him in 1999, dispels any possible nexus or causal connection between said events. However, even assuming that Hasan could establish a prima facie case, B & R demonstrated by clear and convincing evidence that its decision not to hire him was motivated by legitimate non-discriminatory reasons, i.e., lack of a professional engineer's license and lack of experience outside the nuclear industry and that such lack of qualifications rebutted any prima facie case which Hasan could allege because a complainant in a refusal to hire situation must establish as part of his prima facie case that he was qualified for available work. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 505-508 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802; Olivares v. National Aeronautics and Space Admin., 114 F.3d 1176 (4th Cir. 1997).

In response, Hasan contends the signed affidavit of B & R's chief engineer, Morton Rothstein, is defective in that it: (1) was received on July 26, 2000 rather than the deadline of July 21, 2000; (2) did not contain a statement that affiant was competent to testify on the matters asserted; and (3) did not contain an exhibit A submitted with the original, timely but unsigned affidavit of Rothstein. I find no merit to these contentions in that the signed affidavit contained no new information not originally submitted with the unsigned affidavit which was filed and received on July 21, 2000 and Hasan was granted an extension of time in which to object to Rothstein's signed affidavit. Further, the affidavit does indicate that Rothstein,

as chief engineer responsible for hiring B & R's engineers, was competent to testify about the matters contained in his affidavit.

Hasan contends that Rothstein's affidavit is deficient because it does not provide the number of years he has worked as a chief engineer for B & R, Rothstein's complete job resume, the number of engineers/designers working in B & R's pipe support group, the number, names, and resumes of pipe support engineers hired in B & R's pipe support group since May 1999. Hasan also further contends that: (1) B & R's advertisements do not state that a P.E. license is mandatory for civil structural positions; (2) he (Hasan) did not apply for the position senior civil structural engineer but rather structural engineer; (3) B & R was fully aware of his protected activity by November 10, 1999; (4) B & R made false statements to OSHA regarding his past work record at B & R concerning his performance and absenteeism; and (5) he (Hasan) engaged in internal whistle blowing activity at B & R in 1979 which has resulted in B & R continuously and systemically refusing to hire him from that date to the present.

Regarding the alleged lack of information in Rothstein's affidavit, I find no merit in Hasan's assertion for B & R did pursuant to discovery provide him with the identity and background of engineers hired in pipe support since May, 1999. Hasan did not establish any basis for acquiring Rothstein's resume, nor any reason for knowing the identify or numbers of engineers working in pipe support. Also, contrary to Hasan's assertion he did apply for the position of senior civil engineer as was evident in his November 2, 1999 letter to B & R. Hasan's other assertions are treated below.

D. Discussion

The undisputed facts show that Hasan has worked as a civil/structural engineer in the nuclear industry for over 23 years and in that capacity worked for B & R in New Jersey from April, 1974 through September 1979, on the Clinch River Breeder Reactor project. During the last several months of his employment with B & R, Hasan was assigned to the pipe support group as a senior engineer reporting to supervisor Patel who in turn reported to Robert Palm. While working for pipe support Hasan became concerned about the accuracy of pipe stiffness and deflection calculations which he had been assigned to verify and which did not follow recognized mechanical procedures. Hasan expressed safety concerns to Patel, but was advised despite potential endangerment of pipe supporting structures, to continue with existing procedures. Hasan refused to follow Patel's instruction and resigned about 2 weeks later taking a higher paying job with Nuclear Power Services.

While working for B & R no supervisors disciplined Hasan or threatened to discipline Hasan for his refusal to follow Patel instructions. Until the instant complaint filed some 20 years later in November, 1999, Hasan never reported his concerns to the NRC or any other governmental agency. Hasan had no further contact with any B & R official after 1979 other than a brief conversation in 1985 with Palm when Hasan inquired about but was discouraged about further employment with B & R. On May 28, July 9, September 1 and November 2, 1999, Hasan, in apparent response to several civil/structural engineering job advertisements from B & R sent to B & R his resume applying for the position of senior civil/structural engineer.⁷ Hasan never spoke to any representative of B & R concerning job openings, or his resume, and qualifications, and could not identify any supervisor employed by B & R in 1999, even though a list of supervisors was provided to him during the discovery process.

⁷ As noted previously, although Hasan contends he applied for any position at any salary and location of B & R, it is clear from his November 2, 1999 letter to B & R that he was applying for the position of senior civil/structural engineer.

Morton H. Rothstein is the chief engineer of B & R's civil/structural engineering department and is the person responsible for hiring engineers in that department. In November 1999, B & R's human resources department sent to Rothstein Hasan's resume and cover letter dated November 2, 1999, in which Hasan stated that he was applying for the position of senior civil/structural engineer and indicated his background as a civil/structural engineer in the nuclear field. In that same month B & R had advertised and were searching for engineers in the civil/structural department. Rothstein had no knowledge of Hasan prior to receipt of his resume and cover letter. After reviewing the cover letter and resume Rothstein decided not to hire Hasan because he did not possess a professional engineer license required for the position Hasan sought (principal and senior engineer or above) and B & R had no need since at least 1986 for engineers with nuclear experience because of a decline or downturn in the nuclear industry. B & R hired no senior civil/structural engineers in 1999 who did not have a professional engineer license.

When making the decision not to hire Hasan, Rothstein had no information about Hasan other than his resume and cover letter and was not aware of his prior employment with B & R, other than the information set forth on the resume which showed him working from 1974 to 1979 as a civil/structural engineer performing structural analysis and design on the Clinch River Breeder Reactor Plant Project. Rothstein had no information about Hasan's whistleblowing activities either at B & R or with other employers when he made the decision not to hire him. Although, Hasan sent B & R a letter dated November 6, 1999, which stated in bold type that he had contacted the NRC in the past concerning safety related design project, Rothstein never saw this letter prior to his decision not to hire Hasan. This letter was received on November 10, 1999 by B & R. Moreover, even assuming that Rothstein saw the letter, B & R hired no senior engineer after March 15, 1999.

Hasan believes that B & R refused to hire him because of his past alleged protected, whistleblowing activities at B & R or at other employers. However, considering all the evidence and making all reasonable inferences therefrom in favor of Hasan, I am compelled to nevertheless find that Hasan presented no evidence, either direct or circumstantial, establishing either B & R's knowledge of his whistleblowing activities or any nexus between his protected activities and B & R's decision not to hire him. At most Hasan's case consists of only surmise and conjecture which falls far short of establishing a prima facie case.

Rather, the evidence taken as a whole indicates that the sole reason for B & R's refusal to hire him was a lack of qualifications in that Hasan did not have the requisite professional engineer license for a senior engineer and did not have engineering experience outside the nuclear industry for which B & R was not recruiting.

Thus, I find in accord with Celotex Corp., v. Catrett, 477 U.S. 317, 323-323(1986) that Hasan has established no genuine issue of material fact and that B & R is entitled to its motion for summary judgment dismissing the instant complaint. Regarding Hasan's motion for default judgment and sanctions, I find no precedent or otherwise merit to it or for that matter to B & R's requests for Rule 11 sanctions and accordingly deny said motions.

ORDER

In view of the foregoing rulings, I grant B & R's motion for summary judgment and dismiss the instant complaint. Hasan's motion for default judgment and sanctions, as well as B & R's motion for Rule 11 sanctions, are denied.

IT IS HEREBY ORDERED that pursuant to B & R's motion for summary judgment, the instant complaint is hereby dismissed. Hasan's motion for default judgment and B & R's motion for Rule 11 sanctions are without merit and are denied.

ORDERED this 1st day of September, 2000, at Metairie, Louisiana

CLEMENT J. KENNINGTON
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room, S-4309, Frances Perkins Building, 200 Constitution Ave., N.W Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge, See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614(1998).